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IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 72-508

CHARLES C. WILSON, INC. and
TRUST INVESTMENT AND DEVELOPMENT CO., INC.
Petitioners
Appellants

vs.

MEDICENTERS OF AMERICA, INC.
Respondent
Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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CHARLES C. WILSON, INC. and
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ERRATUM

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Appellants show that page 3 of Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been erroneously placed out of order in Section 3 of the Petition and should be part of Section 4 of said Petition and should be located immediately prior to the last paragraph on page 5 of said Petition.

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INDEX

	Page
1. Jurisdiction	1
2. Questions Presented for Review	2
3. Constitutional Provisions and Regulations	2
4. Statement of the Case	4
5. Argument and Citations of Authority	6
6. Conclusion	10
7. Judgments and Order from the U. S. Court of Appeals for the Fifth Circuit	i,ii,iii

CITATIONS

	Page
Beatrice Norman, et al vs. Century Athletic Club, 193 Md. 584	7
Boeing Airplane Co. vs. Fireman's Fund, 44 Wash. 2nd 488	7
Collier vs. Weyman and Connors, 114 Ga 944 (1)	7
Henry Cotton Mills vs. Shoenig & Co., 33 Ga. App. 467.	7
U. S. vs. Gordon, 205 F 2nd 658	8
Wake Broadcasters, Inc. vs. Crawford, 215 Ga. 862	6
Fifth Amendment to the Constitution of the United States of America	2
Fourteenth Amendment to the Constitution of the United States of America	4
Rule 21, Fifth Circuit Court of Appeals	4

IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

1. JURISDICTION

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case, being case No. 72-1317 in said Court on June 29, 1972. [R–Docu 2, 3&4]. Petitioners petition for rehearing was denied on August 7, 1972. [R–Docu 5]. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

2. QUESTIONS PRESENTED FOR REVIEW

a) It is the law of all the individual states by Common Law, Statute and Case Law that the Courts must construe and enforce Contracts as they are written, according to their terms. The Plaintiffs in the case must stand upon the contract as made by the parties. In affirming the judgment of the trial Court in this case, the United States Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the laws of all the States, thereby calling into question the very principles upon which the Law of Contract throughout the nation is based.

b) By refusing the Appellants' request for oral argument, placing the case on the Summary Calendar and rendering a decision without an opinion, The United States Court of Appeals for the Fifth Circuit has departed so far from the accepted, usual and constitutionally guaranteed due process of law and course of judicial proceedings as to call for an exercise of this Court's power of supervision to safeguard the constitutional guarantees of the individual citizen.

c) As a matter of law there was never any contract between the parties hereto. Fundamental principles of law cannot be waived. Further, the principle of waiver does not apply to the present case and waiver is not a legal principle such as can solely maintain a cause of action.

d) A contract may not be extinct and non-existent as to one essential signatory and viable and enforceable by another signatory. It can be clearly seen that the finding of facts and conclusions of law in this and other respects are clearly erroneous.

3. CONSTITUTIONAL PROVISIONS AND REGULATIONS

Fifth Amendment to the Constitution of the United States of America:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be

compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

On January 13, 1969, the Appellants and Dr. Henderson considered the agreement dead, and started to advertise the property for sale which the Appellees knew. The Appellees however, sent down employees to try to negotiate the contract. The Appellees also sent further portions of the agreement to the Appellants for them to sign. The Appellants did not sign the papers and on March 13, 1969, they notified the Appellees that they considered that Paragraph 9 of the Contract had extinguished the agreement [Appendix 77].

On April 2, 1969, the Appellee, Medicenters of America, Inc. a Tennessee corporation filed suit [Appendix 1] against the Appellants and Dr. Henderson in the United States District Court for the Northern District of Georgia, seeking specific performance of the agreement [Appendix 29].

The Appellants filed answer [Appendix 7-11] and demanded the return of their $1,500.00. Dr. Henderson also counter-claimed for his $1,500.00. The Appellees amended their prayer for injunctive relief and specific performance and substituted a prayer for money damages. A motion for Summary judgment filed by the Appellants and Dr. Henderson was denied [Appendix 11-17]. This order and judgment is appealed from.

Trial was had before Judge Henderson, United States District Court, on August 10 and August 12, 1971.

On December 9, 1971, the Trial Court signed an Order, Findings of Fact, Discussion, Conclusions of Law and Judgment [Appendix 17-27] entering judgment in favor of the Appellees against the Appellants, Charles C. Wilson, Inc. and Trust Investment and Development Co., Inc., in the sum of $12,022.73 and that the Appellee recover of the Appellants costs of Court. This judgment is appealed from.

Judgment was also entered in favor of Dr. Henderson against the Appellee in the sum of $1,500.00. This portion of the judgment has not been appealed from.

The Appellants filed a timely Notice of Appeal from the order of the trial Court denying Appellants Motion for Summary Judgment and from the Order and Judgment of December 9, 1971 [Appendix 17-21].

Amendment XIV, Section 1, to the Constitution of the United States of America states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 21, Fifth Circuit Court of Appeals states:

> "When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.
>
> "In such case, the court may in its discretion, enter either of the following orders" 'AFFIRMED. See Local Rule 21.' or 'ENFORCED. See Local Rule 21.'""

4. STATEMENT OF THE CASE

The Appellants, Charles C. Wilson, Inc., a corporation, and Trust Investment and Development Co., Inc., a corporation, were co-defendants in the trial Court with Dr. Charles T. Henderson in whose favor the trial Court found and against whom no cross appeal was taken.

The Appellee, Medicenters of America, Inc., a corporation was the Plaintiff in the trial court.

The Trial Court was the United States District Court for the Northern District of Georgia and the case, Civil Action, File No. 12,585, was tried without a jury before the Honorable Judge Albert Henderson. The Trial Court had jurisdiction over the parties and subject matter of this litigation under 28 U.S.C. Section 1332 although the Appellants maintain that a correct prayer for over $10,000.00 was not made by the Plaintiff.

The Appellants and Dr. Henderson were joint owners of a parcel of land in Marietta, Georgia, and on July 13, 1968, the Appellants and Dr. Henderson entered into the first part of an agreement with the Appellees (Developer) [Appendix of Court of Appeals – page 29 through 35]. The proposed idea was for the Appellants, Dr. Henderson and the Appellees to enter into a partnership to build and operate a nursing home on a portion of the property of the Appellants and Dr. Henderson. A $1,500.00 deposit was paid by the Appellants to the Appellee and Dr. Henderson also paid a $1,500.00 deposit.

Paragraph 9 of the agreement of July 13, 1968 states:

> "That if the Developer is unable, within six (6) months following the execution hereof to obtain a committment for interim and permanent financing in an amount not less than Six Hundred Thousand Dollars ($600,000.00) upon reasonable terms acceptable to it in its sole judgment and discretion then *this agreement shall be for naught held and the parties shall be returned to status quo*" (emphasis supplied) [Appendix P 33].

It was agreed by all parties that on January 13, 1969, the Appellee had not obtained a committment for interim and permanent financing, [Appendix Appellee's Complaint page 1-6]. It was also agreed by all parties that the six months time provision for obtaining the loan committment was unusual but the Appellants did not want to tie up the property beyond six months.

On June 29, 1972, the United States Court of Appeals for the Fifth Circuit affirmed the trial Court's judgment. The Appellants Petition for Rehearing was denied on August 7, 1972.

5. ARGUMENT AND CITATIONS OF AUTHORITY

The first issue placed before this Honorable Court by the Appellants is that the written unambiguous terms of a contract may not be altered by the Courts. This is of vital universal importance for it is a basic principle of all law of contract.

In the case presented before this Court there was an agreement between the Appellants and Appellees [Appendix 29]. Paragraph 9 of the Contract states unequivocably:

> "That if the Developer (Plaintiff) is unable within six (6) months following the execution hereof to obtain a committment for interim and permanent financing in an amount not less than Six Hundred Thousand Dollars ($600,000.00) upon reasonable terms acceptable to it in its sole judgment and discretion then *this agreement shall be for naught held and the parties shall be returned to status quo*" (emphasis supplied).

The Trial Court found as a fact that "by January 13, 1969, the Appellee had not obtained a committment for interim and permanent financing", [Appendix p. 19 (9)] but also found that the Appellants *breached* the contract with the Appellees after January 13, 1969. [Appendix p. 23]. The United States Court of Appeals affirmed the trial Court's judgment.

It is clear that this decision is erroneous, and is in conflict with all law in this area. It is vitally important to all existing and future contracts that the Supreme Court decide whether the Court may alter or ignore written terms of a contract relied upon by a signatory to that contract.

The contract in question was made in the State of Georgia and the law of the State of Georgia is clear as to written terms of contracts. In *Wake Broadcasters, Inc. vs. Crawford, 215 Ga. 862*, the Supreme Court of Georgia held:

> "It is the duty of the courts to construe and enforce contracts as made, and not to make them for the parties. The Plaintiffs in the case must stand upon the contract as made by the parties. *Carr vs. Louisville and Nashville R.R. Co. 141 Ga. 219.*"

In *Henry Cotton Mills vs. Shoenig & Co. 33 Ga. App. 467* it was held:

> Time "is of the essence of a contract when the parties have expressly so treated it. As a general rule a time fixed by a contract within which an option may be exercised is to be regarded as of the essence".

The Supreme Court of Georgia held in *Collier vs. Weyman and Connors, 114 Ga. 944(1):*

> "If two persons enter into a contract wherein it is stipulated that one is to procure a loan of a certain amount of money for the other . . . and no time is fixed in the contract for the procurement of the money, the law will construe the contract to mean that the loan is to be procured within a reasonable time."

If a time is set however, the parties are bound by it unless the parties agree to change it.

Clearly, therefore, decision of the United States Court of Appeals is in conflict with the decisions of the Supreme Court of Georgia.

But this fundamental of law stretches far beyond the State of Georgia.

The United States Court of Appeals is in direct conflict with the basic common law of contract of all the States. The Appellate Courts of Maryland have held in *Beatrice Norman, et al vs. Century Athletic Club, 193 Md. 584:*

> "Construction of a contract depends upon the intention of the parties as expressed therein, and when the parties contract for a specific instrumentality in unambiguous words, such words may not be broadened so as to cover different means to a supposed end."

The Appellate Courts of the State of Washington have held in *Boeing Airplane Co. vs. Fireman's Fund, 44 Wash. 2nd 488:*

> "The meaning of a contract, the terms of which

taken as a whole are plain and unambiguous, is to be deduced from its language alone, and it is unnecessary for a Court to resort to any aids to construction."

There are cases in every State of the nation that declare that the written unambiguous terms of a contract are binding on all signatories equally and will be applied by the Courts.

In *U. S. vs. Gordon, 205 F. 2nd 658*, it was held:

"Parties to a contract must stand upon the contract as made and a court cannot make a new contract for the parties."

The decision in this case before this Honorable Court clearly departs from the rule of law recognized in every State of the nation. It is the principle upon which the law of Contract is founded. Two or more parties come together and in writing set-out the terms of their relationship and place their signatures upon the document to show that they intend to be legally bound by the terms thereof. Now the United States Court of Appeals by this decision says that one of the parties may not be bound by the terms of the agreement.

Here Paragraph 9 of the Contract [Appendix p. 29] states;

". . . then this agreement shall be for naught held and the parties shall be returned to status quo" – on the failure of a specified event.

The Appellees come into court saying, the specified event did not occur but we still wish to enforce the Contract and claim damages for its breach despite the wording of Paragraph 9. As to two of the signatories the Trial Court held they had breached the contract, and Paragraph 9 did not apply. As to Dr. Henderson however, the Trial Court found Paragraph 9 did apply and Dr. Henderson's deposit was returned to him.

Clearly this judgment affirmed by the United States Court of Appeals rocks the very foundation of the law of contract and it is clearly of obvious vital importance that this Honorable Court decide and declare the position of all parties to contracts throughout the nation on this fundamental question.

It is respectfully submitted that Appellants' Petition for a Writ of Certiorari be granted.

The second issue raised by these Appellants is also of vital importance to all people living in the Fifth Circuit of this Nation.

The Appellants herein appealed their case to the United States Court of Appeals for the Fifth Circuit and requested to be heard orally. Appellants were never heard orally.

The case was placed on the Summary Calendar under Local Rule 21 where the judgments appealed from were affirmed. No opinion or reason, even of the four stated in Local Rule 21, is given. No basis or reason whatever was given to the Appellants for depriving them of over Twelve Thousand Dollars ($12,000.00) nor were they given the opportunity to argue their case orally before the Court.

Clearly the United States Court of Appeals has acted against the Fifth Amendment and Fourteenth Amendment of the Constitution of the United States by denying these Appellants due process of law and equal protection of law.

Due process includes the right to argue in your own defense. This has been denied by the United States Court of Appeals of the Fifth Circuit.

It is, therefore, vitally important that this Court decide and declare if the constitutional rights of the citizens in the Fifth Circuit of this Nation may be summarily denied.

It is respectfully submitted therefore that this Petition for a Writ of Certiorari should be granted.

As a matter of law there was never any contract between the parties hereto. Fundamental principles of law cannot be waived. Further, the principle of waiver does not apply to the present case and waiver is not a legal principle such as can solely maintain a cause of action.

A contract may not be extinct and non-existent as to one essential signatory and viable and enforceable by another signatory. It can be clearly seen that the finding of facts and conclusions of law in this and other respects are clearly erroneous.

6. CONCLUSION

For the foregoing reasons, it is respectfully submitted, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

J. M. Grubbs, Jr.
P. O. Box 1149
271 Roswell Street
Marietta, Georgia 30061

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1317

Summary Calendar *

MEDICENTERS OF AMERICA, INC.,
Plaintiff-Appellee,

versus

CHARLES C. WILSON, INC. and TRUST INVESTMENT AND DEVELOPMENT COMPANY, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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(June 29, 1972)

Before THORNBERRY, COLEMAN and INGRAHAM
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1971

No. 72-1317
Summary Calendar

D. C. Docket No. CA 12585

MEDICENTERS OF AMERICA, INC.,
Plaintiff-Appellee,

versus

CHARLES C. WILSON, INC., and TRUST INVESTMENT AND DEVELOPMENT COMPANY, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

June 29, 1972

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1317

Summary Calendar*

MEDICENTERS OF AMERICA, INC.,
Plaintiff-Appellee,

versus

CHARLES C. WILSON, INC. and TRUST INVESTMENT AND DEVELOPMENT COMPANY, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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(August 7, 1972)

ON PETITION FOR REHEARING

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CERTIFICATE OF SERVICE

I, J. M. GRUBBS, JR., Attorney for Petitioners (Appellants) do certify that I have, prior to filing, served three (3) copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, in the foregoing case, upon counsel for the Respondent (Appellee), by mailing same to his office, to-wit:

Mr. Stanley P. Meyerson
HATCHER, MEYERSON, OXFORD AND IRVIN
40 Marietta Street, N. W.
Atlanta, Georgia 30303

It is hereby stated, pursuant to Rule 33 of Supreme Court Rules, that 28 U.S.C.A. Section 2403, may be applicable and service pursuant thereto has, prior to filing, been made upon Solicitor General, Department of Justice, Washington, D.C. 20530. The Court of Appeals was requested, under Rule 44 of the Federal Rules of Appellate procedure, to certify to the Attorney General the fact that a question of constitutionality has been drawn into question.

There are no other parties than those stated above, upon whom service needs to be perfected.

This 26 date of Sept. , 1972.

J. M. Grubbs, Jr.